

DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CA06-102

September 20, 2006

DEWITT BANK & TRUST CO.
APPELLANT

AN APPEAL FROM ARKANSAS COUNTY
CIRCUIT COURT, [NO. CV2003-60]

v.

HONORABLE DAVID HENRY,
CIRCUIT JUDGE

ZADA SIMPSON, Individually and as
attorney in fact for Archie Hargrove, dba
Hargrove Simpson Farm

APPELLEE

AFFIRMED IN PART, REVERSED AND
DISMISSED IN PART ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL

In this case from Arkansas County, the jury awarded appellant Dewitt Bank & Trust Company (the Bank) \$85,060.39 on its unjust-enrichment claim against appellee Zada Simpson, and awarded Simpson \$27,000 on her breach-of-fiduciary-duty claim against the Bank.¹ The Bank appeals and argues that the evidence supported a greater monetary award on its unjust-enrichment claim and that, for various reasons, Simpson's \$27,000 verdict should be overturned. Simpson cross-appeals, presenting the sole issue of whether the trial

¹ Zada Simpson proceeded below on her own behalf and on behalf of her brother, Archie Hargrove, for whom she has power of attorney.

court erred in failing to give a particular jury instruction. We affirm in part and reverse and dismiss in part on direct appeal and affirm on cross-appeal.

This case has its genesis in a 1994 Farm Management Agreement under which the Bank was hired to manage Simpson's 600-acre farm. The agreement provided that, among other things, the Bank would act as Simpson's agent; would have "complete and undivided charge and management" of the farm; would earn a fee for its services; and would provide Simpson with annual audits of receipts and disbursements. The agreement further recited that excess funds in the farm's operating account would be transferred to Simpson annually or upon her request and that operating funds remaining at the end of the accounting year would be used to "repay any loans for farm operating expenses made during the year to the Owner or this agency." Despite this last statement, the agreement did not expressly grant the Bank authority to execute loans on Simpson's behalf without her prior knowledge. At the time that the agreement was executed, the farm was debt-free.

During the course of the parties' dealings, the farming operation proceeded in a productive manner, with crops of wheat, rice, and soybeans being grown there. Simpson received regular monetary distributions from the Bank and occasionally requested additional funds, ranging between approximately \$31,000 to \$52,000 per year. Capital improvements were also made to the farm, and, according to the Bank, \$85,060.39 was expended for such improvements, which, as best we can discern from the record, primarily took the form of a pipeline-irrigation system. However, according to Simpson, she was unaware that, during most of the duration of the management agreement, the Bank was executing several loans

on behalf of the farm, with the Bank as lender. It is the existence of these loans that gave rise to the causes of action in this case.

Simpson testified that she learned of the loans in 2002, and, as a result, she terminated the management agreement. Thereafter, the Bank filed a declaratory-judgment action seeking to establish the rights and liabilities of the parties upon termination. Once that action was concluded, the Bank filed the present lawsuit, seeking repayment from Simpson for \$139,130 in past due promissory notes. In a subsequent, amended complaint, the Bank asserted a second count, claiming that Simpson was unjustly enriched by retaining the benefits of the loans. Simpson responded that the Bank's execution of the notes was unauthorized, and she asserted a counterclaim in which she alleged that the Bank had breached its fiduciary duty by self-dealing, entering into unauthorized loans, expending loan proceeds for unknown purposes without consulting her or providing an accounting to her, failing to pay the loans when due, and failing to disclose the financial condition of the farm.

The case went to trial, and the jury returned a verdict of \$85,060.39 on the Bank's claim for unjust enrichment — the precise amount the Bank claimed was spent for capital improvements to the farm.² On a separate verdict form, the jury determined that the Bank had breached its fiduciary duty to Simpson, and she was awarded \$27,000. Judgment was entered on the verdicts, after which the Bank filed a timely post-trial motion. Therein, the Bank sought a judgment notwithstanding the verdict (JNOV) or a new trial on its unjust-

² The verdict form instructed the jurors not to proceed to the next interrogatory if they found that unjust enrichment had occurred, so no verdict was rendered on the Bank's claim for breach of the promissory notes.

enrichment claim, arguing that the evidence supported a damage recovery of \$137,318.55 rather than \$85,060.39. The Bank also sought a JNOV on Simpson's breach-of-fiduciary-duty verdict, contending that there was no substantial evidence to support the verdict or the \$27,000 damage award. Following a hearing, the trial court denied the motion, and timely notices of appeal and cross-appeal followed.

Direct Appeal — JNOV or New Trial on the Bank's Unjust-Enrichment Claim

Because only one of the Bank's several points on appeal involves the unjust-enrichment verdict, we will address that issue first for the sake of convenience. The Bank argues, as it did below, that the evidence unequivocally showed that Simpson was unjustly enriched in the amount of \$137,318.55 rather than the \$85,060.39 awarded by the jury, and, therefore, the trial court should have granted the Bank's motion for a directed verdict, made during the trial, or its motion for either a JNOV or a new trial, made following the entry of judgment.

The standard of review for the denial of a motion for a directed verdict is whether the jury's verdict is supported by substantial evidence, meaning evidence that goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *See Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). A motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of the evidence; a trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the jury verdict, and the moving party is entitled to judgment as a matter of law. *Conagra, Inc. v. Strother*, 340 Ark. 672, 13

S.W.3d 150 (2000). As for the denial of a motion for a new trial, where the primary issue is the alleged inadequacy of the jury's award, we will sustain the trial court's denial of the motion unless there is a clear abuse of discretion. *Garrett v. Brown*, 319 Ark. 662, 893 S.W.2d 784 (1995).

The figure that the Bank asserts as the proper amount of damages, \$137,318.55, is taken from an exhibit prepared by Bank officer Jason Grantham. The exhibit provides a summary of farm income, expenses, capital improvements, and disbursements made to Simpson between 1994 and 2002. It reflects that, when outlays for expenses, distributions, and capital improvements are deducted from the farm's income over the relevant period, a negative figure of \$137,318.55 results. Grantham testified that this amount was, therefore, what Simpson received over the course of the parties' nine-year relationship.

The jury, in considering this exhibit, obviously decided that Simpson had been unjustly enriched only to the extent that capital improvements had been placed on the farm, the amount for which the exhibit listed as \$85,060.39. The Bank contends, however, that Simpson was also unjustly enriched for the additional \$52,258.16, which represents the amount that she received as distributions over and above the income produced by the farm.

In making this argument, the Bank focuses on the fact that Simpson admitted in her testimony to receiving regular income disbursements from the Bank, *i.e.*, from the farm operating account, and to occasionally receiving additional amounts over and above her regular disbursements, including payment for repairs to her property. However, we believe that the jury's determination that Simpson was not unjustly enriched by these disbursements

is supported by substantial evidence. Our supreme court recently set out the law regarding unjust enrichment:

To find unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore. There must also be some operative act, intent, or situation to make the enrichment unjust and compensable. One who is free from fault cannot be held to be unjustly enriched merely because he or she has chosen to exercise a legal or contractual right. In short, an action based on unjust enrichment is maintainable where a person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain.

Hatchell v. Wren, 363 Ark. 107, ___, ___ S.W.3d ___, ___ (2005) (citations omitted).

Simpson's testimony was to the effect that, over the course of the management agreement, she was not aware that her disbursements were financed by anything other than farm income — she was not aware of any loans. Had she known of the loans, she said, she would have been “scared to death,” would not have spent more than was coming in, and would have tried to reduce spending. She also testified that she was unaware of any financial problems involving the farm that would cause her to reduce her disbursements, and her testimony is bolstered by the fact that, in 1999, the Bank, without any request on her part, decided to raise the amount of her monthly distribution. Under these circumstances, the jury might well have found that Simpson could not be faulted for receiving and retaining monies paid to her when she had reason to believe that her farm was generating that income. *See, e.g., Merchants & Planters Bank v. Massey*, 302 Ark. 421, 790 S.W.2d 889 (1990) (where a wife was permitted to retain the benefit of loan proceeds when she was unaware her husband had signed her name to the note).

In light of these factors, we decline to hold that the jury's verdict was not supported by substantial evidence or that the trial court abused its discretion in denying a new trial. We therefore affirm the jury's verdict of \$85,060.39 on the Bank's unjust-enrichment cause of action.

Direct Appeal — JNOV on Simpson's Breach-of-Fiduciary-Duty Claim

We turn next to the Bank's arguments with regard to the \$27,000 breach-of-fiduciary-duty verdict in favor of Simpson. The Bank makes five separate arguments with regard to this verdict: 1) Simpson's counterclaim for breach of fiduciary duty should have been dismissed because it was required to be filed as a compulsory counterclaim in the prior declaratory-judgment action; 2) Simpson's counterclaim was barred by res judicata; 3) the trial judge erred in instructing the jury on breach of fiduciary duty; 4) there was no substantial evidence to support the jury's finding of a breach of fiduciary duty; 5) there was no substantial evidence to support the damage award of \$27,000. Because we agree with the Bank on its last point, we reverse and dismiss on that basis without addressing the remaining issues.

The Bank, in its directed-verdict motion and in its JNOV motion, argued that Simpson failed to prove that she suffered any damages that were proximately caused by the Bank's conduct; the JNOV motion particularly argued that the \$27,000 verdict amount was not supported by the evidence. This same argument is made on appeal, and we must agree that the Bank is correct.

While Simpson testified, for example, that she was unaware of the loans that the Bank executed on behalf of the farm and that the Bank did not discuss with her the financial condition of the farm, she did not produce evidence from which the jury could make an informed decision about the amount of damages she suffered, if any. Damages must not be left to speculation and conjecture. *Dawson v. Temps Plus, Inc.*, 337 Ark. 247, 987 S.W.2d 722 (1999). Further, evidence must exist which affords a basis for measuring the plaintiff's loss with reasonable certainty, and the evidence must be such that the jury may find the amount of the loss by reasonable inferences from established facts, and not by conjecture, speculation or surmise. *See Jag Consulting v. Eubanks*, 77 Ark. App. 232, 72 S.W.3d 549 (2002) (holding that the trial court should have granted a directed verdict when the plaintiff failed to produce such evidence). The jury's award of \$27,000 in this case — an amount that does not correspond to any evidence of loss experienced by Simpson — is an indication of confusion and speculation on the jury's part. There seems to be, as the supreme court said in *Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 721, 934 S.W.2d 485, 494 (1996), no "rhyme or reason for this amount." We therefore conclude that a directed verdict or a JNOV should have been entered on Simpson's breach-of-fiduciary-duty claim. *See Jag Consulting, supra*. Thus, we reverse and dismiss on this point.

Cross-Appeal — Failure to Give Instruction Requested by Simpson

Simpson asked the court to instruct the jury as follows:

A person who officiously confers a benefit upon another is not entitled to restitution for that benefit. A person officiously confers a benefit upon another when he confers the benefit without having been requested to do so or without having legal authority to do so.

If you find that plaintiff conferred any benefits upon the defendant without having been requested to do so or without having legal authority to do so, then your verdict should be for the defendant.

Simpson requested this instruction on the grounds that there was evidence that she was not unjustly enriched by any benefits that she received but, rather, those benefits were officiously conferred on her by the Bank.

A party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the instruction; however, we will not reverse a trial court's refusal to give a proffered instruction unless there was an abuse of discretion. *See Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004). We do not believe that the trial court abused its discretion in refusing the instruction in this case.

First, the instruction does not appear to be an accurate statement of the law. It tells the jury that, if *any* benefits were conferred on Simpson without her request or legal authority “then your verdict should be for the defendant.” This implies that the conferring of any officious benefit should result in a complete verdict for Simpson, rather than merely stating that the Bank should not recover for any particular benefit officiously conferred. A trial court's refusal to give an incorrect instruction is not error. *See Mack v. Wilkerson*, 304 Ark. 114, 801 S.W.2d 26 (1990); *Davis v. Ark. State Highway Comm'n*, 290 Ark. 358, 719 S.W.2d 694 (1986).

Second, we believe that the essence of what Simpson was attempting to convey to the jury in her proposed instruction was adequately covered by the jury instructions on the

Bank's claim for restitution and unjust enrichment. *See generally First Commercial Bank v. McGaughey Bros., Inc.*, 30 Ark. App. 174, 785 S.W.2d 236 (1990) (holding that the trial court did not err in refusing a jury instruction where the matter was adequately covered by other instructions). The jury was instructed that the Bank had the burden of proving that Simpson:

obtained something of value to which [she was] not entitled, and in doing so unjustly enriched [herself] at the expense of [the Bank]. There must also be some operative act, intent or situation...to make the enrichment unjust and compensable.

The concepts of officious benefit and unjust enrichment are similar in nature. The ultimate question is whether, under the circumstances, justice dictates that the plaintiff have restitution. *See, e.g., Childs v. Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995). The jury, with the above instruction, was given the means to determine whether Simpson was or was not equitably entitled to retain some of the benefits she received. It is apparent from the jury's verdict that it believed she was entitled to keep certain benefits but was unjustly enriched by the retention of those related to capital improvements on the farm. Given these circumstances, we cannot say that the trial court abused its discretion in refusing Simpson's instruction.³

Affirmed in part and reversed and dismissed in part on direct appeal; affirmed on cross-appeal.

BAKER and ROAF, JJ., agree.

³ Although the trial court did not use this line of reasoning in refusing the instruction, we will affirm the court's ruling if it is correct for any reason. *See Alexander v. Chapman*, 299 Ark. 126, 771 S.W.2d 744 (1989).